Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

MIKE WAYNE GEHNER,

Petitioner,

v.

CITY OF LAS VEGAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the statutory confrontation scheme set forth in NRS 50.315(6) as adopted by the Nevada Supreme Court in *Walsh II, infra*, is unconstitutional under *Crawford v. Washington, infra*, and the Sixth Amendment Confrontation Clause.

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PETITION FOR A WRIT OF CERTIORARI

MIKE WAYNE GEHNER (GEHNER) respectfully prays that a Writ of Certiorari issue to review the Nevada Supreme Court's decision in *Walsh II, infra* on the grounds that it violates *Crawford v. Washington, infra* and the Sixth Amendment Confrontation Clause. *Walsh II, infra* unconstitutionally holds that when a defendant is confronted with a *testimonial* ex parte hearsay statement under NRS 50.315, it is the trial judge that determines whether or not cross examination is permitted, not the Confrontation Clause. Also, review is vital based on the significant number of state trials that are affected by *Walsh II*.

OPINIONS BELOW

1. *City of Las Vegas v. Walsh*, 121 Nev. Adv. Op. No. 85 (December 15, 2005) (*Walsh II*). Appendix (App.) 1-12.

2. *City of Las Vegas v. Walsh*, 120 Nev. Adv. Op. No. 44 (June 11, 2004) (*Walsh I*). App. 16-27.

3. "Conclusions of Law and Order Denying Application for Writ of Mandamus" (filed Apr. 9, 2003). App. 13-15.

JURISDICTION

The instant Petition is filed under 28 U.S.C. § 1257 and the date of the Nevada Supreme Court decision to be reviewed was entered December 15, 2005. (*Walsh II*)

CONSTITUTIONAL PROVISIONS

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

STATUTES INVOLVED IN THIS CASE

NRS 50.315 (This statute is incorporated in the App. 28-31.)

STATEMENT OF THE CASE

Petitioner Gehner challenged the constitutionality of NRS 50.315(4) in *City of Las Vegas v. Walsh*, 120 Nev. Adv. Op. No. 44 (June 11, 2004) (hereinafter *Walsh I*). *Walsh I*, a three-judge panel, held that the affidavit prepared under NRS 50.315(4) was *testimonial* under *Crawford, infra*, and that admission of the affidavit violated Gehner's Sixth Amendment right of confrontation. *Walsh I* stated, "Because the aforementioned Confrontation Clause test was not satisfied in this instance, we conclude that the nurse's affidavit was not admissible." App. 26. The panel subsequently denied appellant *City of Las Vegas'* petition for rehearing, and the City filed a petition for *en banc* reconsideration. The court granted the petition and withdrew the court's June 11, 2004 opinion in *Walsh I*.

In *City of Las Vegas v. Walsh*, 121 Nev. Adv. Op. No. 85 (December 15, 2005) (hereinafter *Walsh II*), the court *en banc* reversed *Walsh I* stating that the statutory confrontation

scheme in NRS 50.315(6) "preserves the rights of an accused under the Confrontation Clause of the United States Constitution." App. 11. The nurse's *testimonial* ex parte hearsay affidavit was held to be admissible at trial even though Petitioner Gehner had no opportunity to cross examine the witness. *Walsh II* is the resurrection of *Ohio v. Roberts, infra*, and violates *Crawford, infra*. NRS 50.315(6) unconstitutionally mandates that it is the judge who determines whether cross examination will be allowed and not the Confrontation Clause. Gehner now seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

WALSH II VIOLATES THE SIXTH AMENDMENT CONFRONTATION CLAUSE

a. Gehner presents an important federal question which affects criminal trials in Nevada, and should be reviewed by this Court under Rule 10(c).

Prior to *Crawford, infra*, Nevada allowed *testimonial* ex parte hearsay statements made under NRS 50.315 to be admitted as evidence against the accused. At Petitioner Gehner's criminal trial, the judge refused to admit the nurse's affidavit because the affidavit contained evidentiary facts not authorized by NRS 50.315. The prosecution challenged the trial judge's ruling which eventually was heard by the Nevada Supreme Court. During the pendency of Gehner's case, *Crawford, infra* was decided and confrontation became an issue under the Sixth Amendment.

The Sixth Amendment Confrontation Clause guarantees that "[i]n all criminal prosecutions" the accused be allowed to cross examine the "witnesses against him." The only exception is when the witness is unavailable and the defendant had a prior opportunity to cross examine that witness' *testimonial* ex parte hearsay statements. *Crawford v. Washington*, 541 U.S. 36 (2004). Ignoring *Crawford*, the Nevada Supreme Court adopted a statutory scheme which operates to deny a criminal defendant his Sixth Amendment Confrontation rights. An accused's constitutional right to cross examination is conditioned on satisfying NRS 50.315(6).[1] In *Walsh II*, the court held that the failure of the accused to satisfy NRS 50.315(6) is deemed a waiver of the defendant's constitutional confrontation rights. "Failure to properly raise a dispute of fact with regard to affidavits admitted under NRS 50.315 constitutes a waiver of the defendant's opportunity to confront the witnesses against him."[2] App. 10. NRS

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[1] NRS 50.315(6) puts the "cart before the horse." A defendant is required to establish a "substantial and bona fide dispute" regarding the *testimonial* ex parte facts before being allowed cross examination of the witness. It is cross examination itself which often produces the disputed fact. In those cases when a defendant does not need or desire cross examination, the state prosecutor can obtain a stipulation accordingly.

[2] *Walsh II* creates inconsistency and error regarding constitutional waivers. In *Raquepaw v. State*, 108 Nev. 1020, 1022-23, 843 P. 2d 364 (1992), the court said, "Counsel cannot waive these [fundamental constitutional] basic trial rights over a client's objection. The right of confrontation is such a right and cannot be waived over objection." (citation omitted). *See also, DeRosa v. Dist. Ct.*, 115 Nev. 225, 234, 985 P.2d 157 (1999) ("Given the trustworthiness of the evidence [NRS 50.315 *testimonial* ex parte hearsay affidavits], only the *statutory right* to confront the witness is implicated, not the Confrontation Clause." (citation omitted.) (emphasis original.) A waiver of a fundamental constitutional right must be "an intentional relinquishment or

(Continued on following page)

50.315(6) provides how a defendant must establish a disputed fact.

> 6. If, at or before the time of the trial, the defendant establishes that:
>
> (a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and
>
> (b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,
>
> the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

Walsh II concluded, "Therefore, we are convinced that NRS 50.315 adequately preserves the constitutional right to confront witnesses against a defendant by providing a statutory confrontation mechanism." App. 10. *Walsh II* violates *Crawford* and resurrects *Ohio v. Roberts*, 448 U.S. 56 (1980). NRS 50.315(6) mandates that it is the judge who determines whether the defendant's claim is a "substantial and bona fide dispute regarding the facts in the affidavit or declaration." Further, it is the judge who decides if "it is in the best interest of justice" to allow cross examination. To add obvious insult to inevitable injury, even if the accused satisfies the first two requirements, the trial judge is not obliged to allow cross examination.

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abandonment of a known right or privilege" by the defendant. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *Walsh II* also violates *Zerbst*.

NRS 50.315(6)(b) holds: "the court *may* order the prosecution to produce the witness. . . ." (emphasis added.) *Walsh II* holds that it is the trial judge who determines whether or not cross examination is permitted, not the Confrontation Clause. *Walsh II's* confrontation waiver scheme is unconstitutional and an affront to the holding of *Crawford*. Petitioner Gehner's Writ of Certiorari should be granted.

CONCLUSION

A judicial determination as to the right of cross examination on *testimonial* ex parte hearsay facts nullifies the Sixth Amendment Confrontation Clause. *Walsh II* violates *Crawford, supra*, and the Sixth Amendment Confrontation Clause. Petitioner Gehner respectfully requests that his Writ of Certiorari be granted.

Respectfully submitted,

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Cite as: City of Las Vegas v. Walsh
121 Nev. Adv. Op. No. 85
December 15, 2005

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 41317

CITY OF LAS VEGAS,

Appellant,

vs.

THE HONORABLE JESSIE WALSH, JUDGE OF THE LAS VEGAS MUNICIPAL COURT, AND MIKE WAYNE GEHNER,

Respondents.

Petition for en banc reconsideration of 120 Nev. 392, 91 P.3d 591 (2004). Appeal from a district court order denying a petition for a writ of mandamus challenging a municipal court's decision in a criminal proceeding. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

Petition granted; opinion withdrawn; reversed and remanded with instructions.

Bradford R. Jerbic, City Attorney, and Edward G. Poleski, Deputy City Attorney, Las Vegas, for Appellant.

Martin D. Hastings, Las Vegas, for Respondent Gehner.

BEFORE THE COURT EN BANC.

OPINION

By the Court, BECKER, C.J.:

This case involves the scope of NRS 50.315(4), which permits the admission of a nurse's affidavit to prove certain facts relating to the withdrawal of blood for testing purposes. It also implicates the construction of that statute in light of the United States Supreme Court's recent holding in *Crawford v. Washington*.[1]

On June 11, 2004, a panel of this court issued an opinion in this case limiting the admissibility of a registered nurse's affidavit in respondent Mike Gehner's trial for driving under the influence of alcohol. This court concluded that the affidavit was testimonial under *Crawford* and that admission of the affidavit violated Gehner's Sixth Amendment right of confrontation.[2] The panel subsequently denied appellant City of Las Vegas's petition for rehearing, and the City then filed a petition for en banc reconsideration. Having considered the City's petition and Gehner's response, we conclude that en banc reconsideration is warranted because this case involves an issue of substantial precedential and constitutional import – the constitutionality of NRS 50.315(4) in light of Crawford.[3] We therefore grant the petition and withdraw the court's June 11, 2004, opinion.

We conclude that the affidavit complied with NRS 50.315(4) and was admissible. Therefore, the municipal and district courts erred in excluding the affidavit for noncompliance with the statute. We further conclude that NRS 50.315(4) is not unconstitutional because it adequately preserves the rights of an accused under the Confrontation Clause of the United States Constitution.[4] Accordingly, we reverse the judgment of the district court

and remand the matter to the district court with instructions to grant the writ of mandamus and direct the municipal court to determine whether Gehner has waived any objection to the admission of the affidavit in light of our opinion.

FACTS AND PROCEDURAL HISTORY

Gehner was charged with misdemeanor driving under the influence of alcohol. At trial, the City requested a ruling from the municipal court regarding Gehner's objection to the admissibility of a registered nurse's affidavit.

The affidavit stated the nurse's name and employer, that she was authorized to withdraw blood as a regular part of her duties, the date and time she withdrew the blood, that she withdrew Gehner's blood in a medically acceptable manner, that she used no alcohol solutions or alcohol-based swabs, and that she kept the sample in her custody and in the same condition as when she withdrew it until she delivered it to law enforcement officials.

The City argued that all of the facts contained in the nurse's affidavit were admissible under NRS 50.315(4). Gehner did not contest the validity of the facts contained in the affidavit. Rather, he argued that the affidavit's contents exceeded the scope of information permissible under the statute, namely that the nurse used no alcohol solutions or alcohol-based swabs. Gehner argued that the inadmissible facts should be redacted from the affidavit. Gehner then argued that the municipal court should order the prosecution to produce the nurse so that Gehner could ask whether any alcohol solutions or swabs had been used in withdrawing the blood.

The municipal court concluded that the nurse's affidavit exceeded the scope of NRS 50.315(4), struck portions of the affidavit as being noncompliant with the statute, and ordered the prosecution to produce the nurse.[5]

The City filed a petition for a writ of mandamus in the district court, requesting the district court to compel the municipal court to admit the nurse's affidavit in its entirety. After holding a hearing, the district court denied the petition, agreeing with the municipal court's interpretation of NRS 50.315(4). The City appealed.

DISCUSSION

A district court's decision to deny a writ petition is generally reviewed under an abuse of discretion standard.[6] However, questions of statutory construction are questions of law that this court must review de novo.[7] Two issues of law are presented in this appeal: (1) whether factual information in a nurse's affidavit may exceed the enumerated information contained in NRS 50.315(4), and (2) whether NRS 50.315(4) is unconstitutional under *Crawford*.

Affidavit limitations

Gehner contends that only information specifically listed in NRS 50.315(4) may be admitted by affidavit. This court's primary objective in construing a statute is to give effect to the Legislature's intent.[8] In so doing, this court must first look to the plain language of the statute.[9] But, if the statutory language is ambiguous or otherwise does not speak to the issue before this court, this court must construe the statute "'in line with what reason and public policy would indicate the legislature intended.'"[10]

NRS 50.315(4) provides that the affidavit of a person who withdraws a sample of blood from another for analysis by an expert is admissible to prove certain facts:

> (a) The occupation of the affiant or declarant;
>
> (b) The identity of the person from whom the affiant or declarant withdrew the sample;
>
> (c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and
>
> (d) The identity of the person to whom the affiant or declarant delivered it.

On its face, subsection 4 does not discuss much of the information contained in the affidavit at issue. However, subsection 4 is part of a larger statute. NRS 50.315(8) delegates the power to adopt regulations prescribing the form of an affidavit under the statute to the Committee on Testing for Intoxication. The affidavit in this case is a form and encompasses standard procedures used to withdraw blood for testing. The record indicates that the form was developed and approved by the committee.[11]

The language of subsection 8, when read in conjunction with subsection 4, creates an ambiguity in the statute. Did the Legislature intend that affidavits cover only the subject matter enumerated in subsection 4, or did it intend to give the committee authority to broaden the scope of the affidavits? Given this ambiguity, we turn to the legislative history to ascertain the Legislature's intent.

The minutes from the Senate Committee on the Judiciary reveal that NRS 50.315(4) was added to avoid the unnecessary appearance of health care professionals at trials or hearings when defense counsel had no cross-examination questions.[12] The judiciary committee was presented with a sample affidavit to illustrate what would be admitted in place of a health care professional's testimony at trial.[13] The sample affidavit is identical in format to the nurse's in this case, including the language about not using alcohol solutions or alcohol-based swabs. Accordingly, the Legislature was aware of the type of statements that might be contained in an affidavit and, thus, arguably did not intend for such statements to be inadmissible under NRS 50.315(4). Rather, the Legislature set forth the minimum information that must be contained in an affidavit and left the remaining information to the discretion of the committee delegated to regulate testing procedures.

Interpreting the statute literally, without regard to subsection 8 or the legislative history, would lead to an absurd result. Health care professionals would be required to testify even when the defendant had no issues for cross-examination. This would undermine the whole purpose of the statute. We conclude that the affidavit was admissible and that the municipal court and district court erred in excluding it on the basis of statutory noncompliance. We now turn the constitutionality of the statute under *Crawford* and the Confrontation Clause.

Confrontation Clause

Although the affidavit may be admissible under state statute, it is still subject to challenge under the Sixth

Amendment of the United States Constitution.[14] The right to cross-examine witnesses is fundamental to a fair trial and applicable to the states through the Fourteenth Amendment.[15] Prior to *Crawford* the affidavit's admissibility would have been governed by the previously well-settled rule of *Ohio v. Roberts*.[16] Under the *Roberts* test, the admission of a hearsay statement against a criminal defendant at trial did not violate the Confrontation Clause provided the statement bore adequate indicia of reliability by either (1) falling within a "firmly rooted hearsay exception," or (2) bearing "particularized guarantees of trustworthiness."[17] In *DeRosa v. District Court*, we concluded that affidavits under NRS 50.315 contained such guarantees of trustworthiness.[18] However, the Court in Crawford rejected the *Roberts* approach.

In *Crawford*, the Court held that the Confrontation Clause bars the use of a testimonial statement made by a witness who does not appear at trial, unless the witness is unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine the witness regarding the statement.[19] Thus, under Crawford, the admissibility of a hearsay statement under the Confrontation Clause now necessarily depends on whether the statement is testimonial in nature. The Court expressly declined to define the term "testimonial," beyond stating that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[20] But the Court did make some observations, illustrating what might be considered testimonial. The Court noted that the text of the Confrontation Clause reflects the Framers' focus on ex parte examinations:

> It applies to "witnesses" against the accused – in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[21]

Given the above examples and our recent decision in *Flores v. State*,[22] we conclude the affidavits specified in NRS 50.315 are testimonial statements. Although they may document standard procedures, they are made for use at a later trial or legal proceeding. Thus, their admission, in lieu of live testimony, would violate the Confrontation Clause. That portion of *DeRosa* that found no Confrontation Clause violation using a *Roberts* analysis is hereby overruled.

However, *DeRosa* also held that Confrontation Clause objections may be waived by failure to comply with statutory procedures.[23] As *DeRosa* noted, NRS 50.315(6) and (7) provide the statutory scheme for the waiver of the Confrontation Clause for NRS 50.315 affidavits. NRS 50.315(6) and (7) state:

> 6. If, at or before the time of the trial, the defendant establishes that:
>
> (a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and
>
> (b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,
>
> the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.
>
> 7. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit or declaration described in this section. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit or declaration.

We concluded in DeRosa that when counsel in a misdemeanor DUI case fails to argue that a substantial and bona fide dispute exists regarding the affidavit or

declaration of the phlebotomist who drew the defendant's blood, that failure acts as a waiver of the defendant's confrontation rights.[24] Defendant's counsel is vested with the authority to waive the defendant's right to confrontation under NRS 50.315.[25] Failure to properly raise a dispute of fact with regard to affidavits admitted under NRS 50.315 constitutes a waiver of the defendant's opportunity to confront the witnesses against him.[26]

DeRosa dealt with a misdemeanor DUI conviction; however, such waiver is available in felony cases as well. The defendant has a greater ability to challenge and exclude an affidavit or declaration offered in a felony DUI case. NRS 50.315(7) indicates that when a defendant in a felony case objects in writing, the court "shall not admit the affidavit or declaration into evidence."

Nothing in *Crawford* compels us to overrule the waiver language in *DeRosa*. The essence of *Crawford* is the need for cross-examination. If defense counsel has no bona fide dispute regarding the facts in an affidavit and credibility of an NRS 50.315 declarant, then cross-examination is meaningless. It serves no purpose to have a witness appear if no questions will be asked on cross-examination. Therefore, we are convinced that NRS 50.315 adequately preserves the constitutional right to confront witnesses against a defendant by providing a statutory confrontation mechanism. Any finding of waiver and admission of the affidavit would be subject to a harmless error review on appeal.[27]

CONCLUSION

We conclude that the nurse's affidavit did not exceed the scope of NRS 50.315(4) and that the district and

municipal courts erred in excluding the affidavit on those grounds.

We further conclude that while NRS 50.315 affidavits may be deemed testimonial in nature under Crawford, certain statutes provide a waiver of that right to confront. The statutory provisions adequately protect the accused's right to confront the witnesses against him while streamlining the trial process, serving both the interests of the accused and judicial economy. We therefore hold that NRS 50.315 adequately preserves the rights of an accused under the confrontation Clause of the United States Constitution. Failure to exercise confrontation rights will act as a waiver of those rights with regard to the affidavits and declarations prepared pursuant to NRS 50.315.

Accordingly, we reverse the judgment of the district court and remand this matter for the district court to grant the petition for a writ of mandamus and direct the municipal court to determine whether Gehner has waived his confrontation rights under NRS 50.315(6).

ROSE, MAUPIN, GIBBONS, DOUGLAS, HARDESTY and PARRAGUIRRE, JJ., concur.

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[1] 541 U.S. 36 (2004).

[2] *City of Las Vegas v. Walsh*, 120 Nev. 392, 91 P.3d 591, *as modified*, 100 P.3d 658 (2004).

[3] NRAP 40A(a).

[4] U.S. Const. amend. VI.

[5] The record reflects that the nurse could not be produced as she had moved out of state.

[6] *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

[7] *Id.*

[8] *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513 (2000).

[9] *Id.* at 1168, 14 P.3d at 513-14.

[10] *State, Dep't of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1249-50 (1994) (quoting *State, Dep't Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986)).

[11] NAC 50.055.

[12] Hearing on S.B. 157 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., February 13, 1995); Hearing on S.B. 157 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 1, 1995).

[13] Hearing on S.B. 157 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., February 13, 1995).

[14] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .").

[15] *Pointer v. Texas*, 380 U.S. 400, 401 (1965); *Drummond v. State*, 86 Nev. 4, 6, 462 P.2d 1012, 1013 (1970).

[16] 448 U.S. 56 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).

[17] *Id.* at 66.

[18] 115 Nev. 225, 234, 985 P.2d 157, 162 (1999).

[19] *Crawford*, 541 U.S. at 68-69.

[20] *Id.* at 68.

[21] *Id.* at 51-52 (alterations in original) (citations omitted).

[22] 121 Nev. ___, 120 P.3d 1170 (2005) (discussing the nature of testimonial statements).

[23] *DeRosa*, 115 Nev. at 234, 985 P.2d at 163.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring); *Flores*, 121 Nev. at ___, 120 P.3d at 1180.

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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF LAS VEGAS, Applicant, vs. **THE HONORABLE JESSIE WALSH JUDGE OF THE LAS VEGAS MUNICIPAL COURT,** Respondent, vs. **MICHAEL W. GEHNER,** Real Party in Interest.	**CASE NO. A-460817-C** **DEPT. NO. I**

CONCLUSIONS OF LAW AND ORDER DENYING APPLICATION FOR WRIT OF MANDAMUS

(Filed Apr. 9, 2003)

This matter having come before the Eighth Judicial District Court by way of an Application for Writ of Mandamus by the Applicant, the CITY OF LAS VEGAS, and this matter having been set for decision on February 24, 2003, Applicant CITY OF LAS VEGAS being represented by Deputy City Attorney Edward G. Poleski, the Real

Party in Interest, MICHAEL WAYNE GEHNER, being represented by Martin D. Hastings, Esq., and the STATE OF NEVADA being represented by Deputy District Attorney Bruce Nelson, and the Court having considered the written briefs on file and oral arguments having been made;

CONCLUSIONS OF LAW

The court noted that there were eleven (11) facts which the Applicant sought to have admitted in the affidavit of declaration of a health care professional. These eleven (11) facts exceeded the four (4) specific facts enumerated in NRS 50.315, nor are they admissible under NRS 51.075.

ORDER

IT IS HEREBY ORDERED that the Applicant's request for issuance of a Writ of Mandamus is hereby denied.

DATED this 8 day of April, 2003.

GENE T. PORTER

GENE T. PORTER,
District Court Judge

Submitted by:

/s/ Martin D. Hastings
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Cite as: City of Las Vegas v. Walsh
120 Nev. Adv. Op. No. 44
June 11, 2004

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 41317

CITY OF LAS VEGAS,

Appellant,

vs.

THE HONORABLE JESSIE WALSH, JUDGE OF THE LAS VEGAS MUNICIPAL COURT, AND MIKE WAYNE GEHNER,

Respondents.

Appeal from a district court order denying a petition for a writ of mandamus challenging a municipal court's decision in a criminal proceeding. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

Affirmed.

Bradford R. Jerbic, City Attorney, and Edward G. Poleski, Deputy City Attorney, Las Vegas, for Appellant.

David J. Roger, District Attorney, and Bruce W. Nelson, Deputy District Attorney, Clark County, for Respondent Judge Walsh.

Martin D. Hastings, Las Vegas, for Respondent Gehner.

BEFORE SHEARING, C.J., ROSE and MAUPIN, JJ.

OPINION

PER CURIAM:

This case involves the admissibility of an affidavit of a registered health professional pursuant to NRS 50.315(4). At the outset of the trial, the City of Las Vegas requested that the municipal court admit the affidavit of a registered nurse who withdrew Mike Gehner's blood. The municipal court ruled that certain facts contained in the affidavit were not admissible, and thus, the nurse would need to testify. The City then filed a petition for a writ of mandamus requesting the district court to compel the municipal court to admit the nurse's affidavit in its entirety. The district court denied the petition. We agree that the affidavit in its entirety was not admissible, but we do so on different grounds from those relied upon by the district court. Accordingly, we affirm the district court's denial of the City's petition for a writ of mandamus.

PROCEDURAL HISTORY

Gehner was charged with driving under the influence of alcohol. At the outset of Gehner's trial, the City requested a preliminary ruling from the municipal court (Judge Jessie E. Walsh) regarding the admissibility of the affidavit of a registered nurse who withdrew blood from Gehner for a blood-alcohol test. The affidavit stated the nurse's name and her employer, that she was authorized to withdraw blood as a regular part of her duties, the date and time she withdrew the blood, that she withdrew the blood from Gehner in a medically acceptable manner, that she used no alcohol solutions or alcohol-based swabs, and that she kept the sample in her custody and in the same

condition as when she withdrew it until she delivered it to law enforcement.

The City argued that all of the facts contained in the nurse's affidavit were admissible; consequently, it was not necessary for the nurse to testify at trial. Gehner countered that certain facts in the affidavit were not admissible under NRS 50.315(4), namely that the nurse used no alcohol solutions or alcohol-based swabs. Gehner argued that if the inadmissible facts were struck from the affidavit, a bona fide dispute would exist; hence, the nurse would need to testify at trial.

The municipal court concluded that the nurse's affidavit could only be admitted for the purposes enumerated in NRS 50.315(4), and the fact that the nurse did not use alcohol solutions or alcohol-based swabs is not one of those purposes. Accordingly, the municipal court resolved that the nurse's presence at trial was necessary and, thus, granted a continuance.

Thereafter, the City filed a petition for a writ of mandamus in the district court, requesting the district court to compel the municipal court to admit the nurse's affidavit in its entirety. After holding a hearing, the district court denied the petition, agreeing with the municipal court's interpretation of NRS 50.315. The City appeals.

DISCUSSION

A district court's decision to deny a writ petition is generally reviewed under an abuse of discretion standard.[1] However, questions of statutory construction are questions of law that this court must review de novo.[2]

In this case, the nurse's affidavit included a statement that she did not use alcohol solutions or alcohol-based swabs in drawing Gehner's blood. The municipal court concluded that a health care professional's declaration regarding the withdrawal and storage of a blood sample is only admissible under NRS 50.315 to establish the four facts specifically identified in the statute. As a result, the municipal court concluded that the existence of a bona fide issue regarding the blood draw required the nurse's presence at trial and, thus, continued the trial. The district court agreed with the municipal court's interpretation of NRS 50.315(4), denying the City's writ petition. We agree with the district court's decision to deny the City's petition for a writ of mandamus, but do so on somewhat different grounds.

NRS 50.315(4) provides that the affidavit of a person who withdraws a sample of blood from another for analysis by an expert is admissible to prove:

> (a) The occupation of the affiant or declarant;
>
> (b) The identity of the person from whom the affiant or declarant withdrew the sample;
>
> (c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and
>
> (d) The identity of the person to whom the affiant or declarant delivered it.

The City argues that, when interpreted broadly, NRS 50.315(4) allows for the inclusion in the affidavit of the nurse's statement that she did not use alcohol solutions or

alcohol-based swabs. The City contends that this statement is admissible pursuant to NRS 50.315(4)(a) to demonstrate her occupation. The City also contends that this statement illustrates that Gehner's blood was withdrawn in a medically acceptable fashion, which is admissible under NRS 50.315(4)(c) as it relates to the condition of the blood sample. Alternatively, the City contends that this statement is admissible under the "catch all" hearsay exception – NRS 51.075.[3] Even if we accept the City's interpretation that the nurse's statement regarding not using alcohol solutions or alcohol-based swabs falls within the parameters of NRS 50.315(4) or the "catch all" hearsay exception, we nevertheless must conclude that the affidavit in its entirety is inadmissible in light of the United States Supreme Court's recent holding in *Crawford v. Washington*.[4]

In *Crawford*, the Court overturned the previously well-settled rule of *Ohio v. Roberts*[5] regarding the admissibility of hearsay evidence under the Sixth Amendment's Confrontation Clause.[6] Under the *Roberts* test, the admission of a hearsay statement against a criminal defendant at trial did not violate the Confrontation Clause provided the statement bore adequate indicia of reliability by either (1) falling within a "firmly rooted hearsay exception," or (2) bearing "particularized guarantees of trustworthiness."[7] The Court in *Crawford* rejected the *Roberts* approach, concluding that it departs from important historical principles because:

> First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same

> time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This maileable standard often fails to protect against paradigmatic confrontation violations.[8]

Accordingly, the Court held that the Confrontation Clause bars the use of a testimonial statement made by a witness who does not appear at trial, unless the witness is unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine the witness regarding the statement.[9] On the other hand, the Court held that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law," including exempting "such statements from Confrontation Clause scrutiny altogether."[10] Thus, under *Crawford*, the admissibility of a hearsay statement under the Confrontation Clause now necessarily depends on whether the statement is testimonial in nature. However, the Court expressly declined to define the term "testimonial," beyond stating that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[11] But the Court did make some observations, illustrating what might be considered testimonial. The Court noted that the text of the Confrontation Clause reflects the Framers' focus on ex parte examinations:

> It applies to "witnesses" against the accused – in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person

> who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[12]

Several courts have issued opinions since *Crawford*, addressing the admissibility of hearsay statements under the new framework. In *State v. Rivera*,[13] the Connecticut Supreme Court determined that a declaration against penal interest was nontestimonial. A witness was permitted to testify regarding a conversation he had with his uncle, wherein his uncle made incriminating statements that he and the defendant had broken into a woman's house looking for items to steal, and that the defendant choked the woman and used an oil lamp to burn the house down.[14] The court concluded that "[t]he statement was not ex parte in-court testimony or its functional equivalent; it was not contained in any formalized testimonial or its functional equivalent; it was not contained in any formalized testimonial materials such as affidavits, depositions

or prior testimony. Moreover, the statement was not a confession resulting from custodial examination. . . . "[15] Thus, the court concluded that the statement was not testimonial in nature, and application of the *Roberts* test was thus appropriate to determine the admissibility of the statement.[16]

Likewise, in *Demons v. State*,[17] the Georgia Supreme Court concluded that, under *Crawford*, the deceased victim's hearsay statements, made during a conversation with a friend before the commission of the crime, were nontestimonial. The court determined that the statements were not similar to prior testimony or police interrogation, which are generally made with the expectation that they might be used at a later trial, and which *Crawford* pronounced were testimonial.[18] Therefore, the court concluded that the trial court did not err in admitting the statements because the victim was deceased, and the statements had the requisite indicia of trustworthiness to withstand a Confrontation Clause challenge.[19]

Finally, in *People v. Moscat*,[20] the New York Criminal Court considered whether a 911 call was admissible in a domestic assault prosecution under *Crawford*. The court observed that because complainants in domestic violence cases often do not appear for trial, prosecutors have increasingly tried to conduct victimless prosecutions by relying on evidence other than the victim's testimony, and that "[p]erhaps the most common form of such evidence is a call for help made by a woman to 911."[21] The court stated that prior to *Crawford*, the 911 call would ordinarily be admitted as an excited utterance without violating the Sixth Amendment's Confrontation Clause.[22] The court acknowledged that under *Crawford*, the relevant inquiry now is not whether the 911 calls fall into a well-rooted

hearsay exception (excited utterance in this instance); rather, the relevant inquiry is whether a 911 call is testimonial in nature.[23] The court concluded that a 911 call is not testimonial in nature for a number of reasons:

> A 911 call is typically initiated not by the police, but by the victim of a crime. It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril. . . . A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid.[24]

Accordingly, the court concluded that a 911 call is nontestimonial and, thus, may be admitted without violating the Sixth Amendment's Confrontation Clause.

Unlike the statements in the aforementioned cases, a health professional's affidavit made pursuant to NRS 50.315(4) is prepared solely for the prosecution's use at trial. As indicated in the title of NRS 50.315, it is "offered to prove certain facts concerning use of certain devices or withdrawal or holding of evidence related to determining presence of alcohol." Based on the cases that have dealt with the issue of whether a statement is testimonial and the inferences that can be drawn from *Crawford* as to what constitutes a testimonial statement, we conclude that an affidavit prepared for use at trial is testimonial. Accordingly, we hold that a health care professional's affidavit made pursuant to NRS 50.315(4) can only be admitted if the health care professional is unavailable to testify at trial and the defendant had a prior opportunity

to cross-examine the health care professional regarding the statements in the affidavit.[25]

We note that the municipal court found that a dispute existed requiring the nurse's presence at trial since the nurse's statement about not using alcohol solutions or alcohol-based swabs was not permitted under NRS 50.315(4). Granted, pursuant to the statutory scheme at issue, the court may order the prosecution to produce a witness if, before trial, the defendant establishes that:

> (a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and
>
> (b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined. . . .[26]

However, we do not think that the situation presented in this appeal is the type of "bona fide dispute regarding the facts in the affidavit" contemplated in NRS 50.315. Here, the parties disputed whether certain facts were admissible as a matter of law, not whether certain facts in the affidavit were accurate. The legislative history reveals that NRS 50.315(6) was added to the statutory scheme to afford the defense an opportunity to call the affiant if the defense showed good cause or reason to question the validity of the affidavit.[27] Thus, a bona fide dispute would have been created under the statute had Gehner questioned the nurse's testing methods, as opposed to challenging the admissibility of a fact contained in the affidavit.

Accordingly, the municipal court's basis for continuing the trial, that it was warranted under NRS 50.315(6), was erroneous. Nevertheless, the municipal court reached the proper result. Thus, the district court did not abuse its

discretion in denying the City's petition for a writ of mandamus.

CONCLUSION

Applying the Supreme Court's holding in *Crawford*, we hold that a health care professional's affidavit made pursuant to NRS 50.315(4) is testimonial, and can only be admitted if the health care professional is unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine the health care professional regarding the statements in the affidavit.[28] Because the aforementioned Confrontation Clause test was not satisfied in this instance, we conclude that the nurse's affidavit was not admissible. Accordingly, we affirm the district court's order denying the City's petition for a writ of mandamus.

---

[1] *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

[2] *Id.*

[3] NRS 51.075(1) provides that "[a] statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness."

[4] 541 U.S. ___, 124 S. Ct. 1354 (2004).

[5] 448 U.S. 56 (1980).

[6] 541 U.S. ___, 124 S. Ct. at 1374.

[7] *Roberts*, 448 U.S. at 66.

[8] *Crawford*, 541 U.S. at ___, 124 S. Ct. at 1369.

[9] *Id.* at ___, 124 S. Ct. at 1374.

[10] *Id.*

[11] *Id.*

[12] *Id.* at ___, 124 S. Ct. at 1364 (alterations in original) (citations omitted).

[13] 844 A.2d 191, 201-02 (Conn. 2004).

[14] *Id.* at 198.

[15] *Id.* at 201-02.

[16] *Id.* at 202.

[17] 595 S.E.2d 76, ___ (Ga. 2004).

[18] *Id.* at ___.

[19] *Id.* at ___.

[20] Slip op 24090, 2004 WL 615113 (N.Y. Crim. Ct. March 25, 2004).

[21] *Id.* at *4.

[22] *Id.*

[23] *Id.* at *5.

[24] *Id.*

[25] *See Crawford*, 541 U.S. at ___, 124 S. Ct. at 1374.

[26] NRS 50.315(6).

[27] Hearing on S.B. 157 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., June 1, 1995).

[28] We note that a defendant is still free to waive his confrontation rights and stipulate to the admission of a health care professional's affidavit.

Nevada Revised Statute 50.315 Admissibility of affidavit or declaration offered to prove certain facts concerning use of certain devices or withdrawal or holding of evidence related to determining presence of alcohol, controlled substance, chemical, poison organic solvent or another prohibited substance.

1. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That the affiant or declarant has been certified by the director of the department of public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath to determine the concentration of alcohol in his breath;

(b) The identity of a person from whom the affiant or declarant obtained a sample of breath; and

(c) That the affiant or declarant tested the sample using a device of a type so certified and that the device was functioning properly.

2. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the concentration of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant; and

(b) That the solution or gas has the chemical composition necessary for accurately calibrating it.

3. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person who calibrates a device for testing another's breath to determine the concentration of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) That on a specified date the affiant or declarant calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee ~~on testing~~ for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

4. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in NRS 50.320 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

5. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison, organic solvent or another prohibited substance may be admitted in any criminal, civil or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The fact that the affiant or declarant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant or declarant delivered it.

6. If, at or before the time of the trial, the defendant establishes that:

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined, the court may order the prosecution to produce the witness and may

continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

7. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit or declaration described in this section. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit or declaration.

8. The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

Supreme Court, U.S.
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No. 05-1052

In The Supreme Court of the United States

MIKE WAYNE GEHNER,

Petitioner,

v.

CITY OF LAS VEGAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Nevada Supreme Court correctly conclude that the non-accusatory declaration of the health care professional was testimonial in nature and, if so, did the Nevada Supreme Court correctly rule that the statutory scheme under Nevada Revised Statute (NRS) 50.315 preserves the Sixth Amendment right to confront witnesses against a defendant by providing a statutory confrontation mechanism?

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STATEMENT OF THE CASE

The Petitioner, Mike Wayne Gehner ("Gehner") was charged with driving under the influence out of an event that occurred May 22, 2001. Prior to his October 30, 2002, trial in Las Vegas Municipal Court, the Respondents, the City of Las Vegas ("City") asked for a preliminary ruling from the municipal court regarding the admissibility of the health care professional's declaration regarding the withdrawal of the whole blood sample that was later tested for alcohol content. (See Respondent's Appendix App. 1-2). The format of the declaration is set under a statutory scheme. (NRS 50.315 [See Petitioner's Appendix pages 28-31] and Nevada Administrative Code 50.055 [See Respondent's Appendix App. 3-4.]) This declaration contains the health care professional's name and employer, affirmation that she was authorized to draw blood, affirmation as to the date and time of the blood draw, affirmation that the blood was withdrawn in a medically acceptable fashion, affirmation that no alcohol solution or alcohol based swabs were used and affirmation that the sample was kept in her custody and in the same condition until she delivered it to the police at a specified time and date. The City argued that the facts contained in the nurse's declaration were admissible under NRS 50.315(4). Gehner did not contest the validity of any fact contained in the declaration. Instead, Gehner argued the law – maintaining that the declaration exceeded the scope of what was admissible under NRS 50.315. The municipal court agreed with Gehner's position and struck portions of the declaration that the judge believed were not in compliance with the statute. The municipal court also ordered the City to produce the nurse for trial. The City then filed a writ of mandamus with the state district court. The

district court agreed with the municipal court's interpretation of NRS 50.315(4). The City then appealed this decision to the Nevada Supreme Court.

Oral argument was scheduled before a panel of the Nevada Supreme Court on March 11, 2004. On March 8, 2004, this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed2d 177 (2004). On June 11, 2004, the Nevada Supreme Court issued an opinion affirming the district court's denial of the City's petition for writ of mandamus. (*City of Las Vegas v. Walsh*, 120 Nev. 392, 91 P.3d 591 (Nev. 2004)). The City then sought rehearing in front of the panel of the Nevada Supreme Court. The Nevada Supreme Court panel denied the motion for rehearing and modified its previous opinion. (*City of Las Vegas v. Walsh*, 100 P.3d 658 (Nev. 2004)). The City then sought en banc reconsideration with the full Nevada Supreme Court. On December 15, 2005, the Nevada Supreme Court withdrew its previous opinions and granted the City's petition for writ of mandamus in *City of Las Vegas v. Walsh* (hereinafter *Walsh II*), 124 P.3d 203 (2005). (See Petitioner's Appendix pp. 1-12). This Petition for Writ of Certiorari was timely filed on February 13, 2006. Gehner has still not gone to trial or been convicted of the underlying charge of driving under the influence.

SUMMARY OF ARGUMENT

The criminal charges pending against Gehner remain unresolved and pending. If Gehner were to go to trial, there is always a possibility he will be acquitted and this issue would become moot as to this case. At this point, this

Court should deny the Petition unless and until Gehner is convicted and re-petitions the Court.

In *Walsh II*, the Nevada Supreme Court concluded that the affidavits or declarations specified in NRS 50.315 were testimonial statements and thus subject to confrontation clause scrutiny under this Court's decision in *Crawford*. The Nevada Supreme Court reasoned that even though this declaration documented only routine procedures, they were made for use at a later trial or legal proceedings and were thus testimonial in nature. The Nevada Supreme Court treated this Court's invitation to consider statements made for the purpose of litigation as merely potentially testimonial statements as an obligation for lower courts to perform such a litmus test. This interpretation mandates that any document that may be used in litigation is per se testimonial, rather than considering the content of the document.

It is the position of the City, however, that the declaration of the health care professional under NRS 50.315 is not testimonial in nature. There is nothing accusatory or incriminatory in this declaration. The health care professional documenting a routine procedure in the withdrawal of a blood sample is not "bearing witness" against a defendant. As far as the declarant knew, the subsequent analysis of the blood might exculpate the defendant. The declaration relates to a routine blood draw that is completed by an unbiased health care professional. Not all statements made in anticipation of litigation are inherently incriminatory and therefore such statements should not be per se testimonial. These declarations are not testimonial and thus not subject to confrontation clause analysis under this Court's opinion in *Crawford*.

Even if these declarations are determined to be testimonial in nature, the Nevada Supreme Court correctly held that the legislative scheme devised by the Nevada Legislature under NRS 50.315 adequately protects a defendant's Constitutional right to confront witnesses. NRS 50.315(6) allows a court to order the prosecution to produce the health care professional in the event the defendant proffers a substantial and bona fide dispute regarding any fact in the declaration and shows any basis to believe that it is in the best interest of justice that the health care professional who signed the declaration be cross-examined. This statutory mechanism merely requires a good faith offer of proof that the presence of the health care professional at trial will assist the fact finder in evaluating a fact of consequence. NRS 50.315(6) adequately protects a defendant's Sixth Amendment confrontation rights while ensuring that a vital member of the health care community is not unnecessarily taken away from their potentially life saving tasks to appear at a criminal trial when there is no good faith question of fact regarding the contents of the declaration.

REASONS FOR DENYING REVIEW

I. THIS COURT SHOULD ABSTAIN FROM DETERMINING THIS ISSUE

Gehner has yet to go to trial or be convicted pursuant to his pending criminal charge of driving under influence. His petition for writ of certiorari is essentially a request for interlocutory relief. Generally, the Federal Courts cannot interfere in a case where the proceedings are already pending in a state court. *Ex parte Young*, 209 U.S. 123, 162 (1908). An accused should first set up and rely

upon his defenses in state court unless it plainly appears that this court would not afford adequate protection. *Fenner v. Boykin*, 271 U.S. 240, 244 (1926). This Court has also made clear "that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is 'both great and immediate.'" *Younger v. Harris*, 401 U.S. 37, 46 (1971), citing *Fenner*, supra.

Gehner has yet to proceed to trial or be convicted in Las Vegas Municipal Court. As a result, this Court should deny review of the issue presented in Gehner's Petition for Writ of Certiorari.

II. THE NEVADA SUPREME COURT'S DECISION IN *WALSH II* WAS CORRECT IN DETERMINING NRS 50.315 DOES NOT VIOLATE THE SIXTH AMENDMENT CONFRONTATION CLAUSE OR THIS COURT'S DECISION IN *CRAWFORD V. WASHINGTON*.

A. The Non-Accusatory Contents of the Declaration of the Health Care Professional Is Not Testimonial in Nature.

In *Walsh II*, the Nevada Supreme Court determined that the declaration of the health care professional was testimonial in nature using the improper litmus test of whether the declaration was "made for use at a later trial or legal proceeding." Under *Crawford v. Washington*, 541 U.S. 36 (2004), the proper conclusion to be drawn is that the non-accusatory content of the declaration is non-testimonial in nature and therefore not subject to Confrontation Clause scrutiny.

The application of the sweeping changes created by *Crawford* in relation to the admissibility of the declaration of the health care professional begins with the historical analysis of the Confrontation Clause engaged in by this Court in *Crawford*. Justice Scalia recognized that at times, England adopted elements of civil law practice. *Crawford*, 541 U.S. 36, 43. Justices of the peace and other officials examined suspects and witnesses before trial. "These examinations were sometimes read in court in lieu of live testimony. . . . " *Id.* This Court noted that the most notorious instance of civil law examination occurred in 1603 during the trial of Sir Walter Raleigh. Lord Cobham, Raleigh's alleged accomplice in treason, implicated Sir Walter Raleigh in an examination before the Priddy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham should be present, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my *accuser* before my face. . . ." *Id.* at 44, citing 2 How. St.Tr., at 15-16. (Emphasis added). The judges refused Raleigh's request and, claiming he was tried by "the Spanish Inquisition" the jury convicted Raleigh and sentenced him to death.

This Court also noted that the problem in the Raleigh case involved the judge's refusal to "allow Raleigh to confront Cobham in court, where he could cross examine him and expose his *accusation* as a lie." *Id.* at 62. (Emphasis added).

Another historical case cited by this Court in *Crawford* were the Bill of Attainder Proceedings against Sir John Fenwick. Fenwick's counsel objected to admitting the examination of a witness that had been taken away, on the grounds that his client had no opportunity to cross examine

the witness. Fenwick's counsel argued "[O]ur Constitution is, that the person shall see his *accuser*." *Id.* at 45, citing 13 How. St.Tr. 537, 591-592 (H.C. 1696) (Powys). (Emphasis added).

In the American colonies, cross examination practices were also controversial. In the early 18th century, the Virginia council protested against the governor for having "privately issued several commissions to examine witnesses against particular men ex parte," complaining that "the person accused is not admitted to be confronted with or defend himself against his *defamers*." *Crawford*, 541 U.S. 36, 48, citing *A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson*, reprinted in 9 English Historical Documents 253, 257. Early state court decisions in the United States also discussed the necessity to cross examine one's accusers. In *State v. Webb*, 2 N.C. 103 (1794), the Court held "[I]t is a rule of the common law, founded on natural justice, that no man shall be *prejudiced* by evidence which he had not the liberty to cross examine." *Id.* at 104. (Emphasis added).

In *Crawford*, this Court recognized that the "principle evil at which the Confrontation clause was directed was the civil law motive criminal procedure, and particularly its use of ex parte examinations as *evidence against the accused*." *Crawford*, 541 U.S. 36, 48. (Emphasis added). The City acknowledges the Court went on to discuss various forms of potentially testimonial statements (affidavits, custodial examinations, prior testimony without an ability to cross examine or similar pre-trial statements that a declarant would reasonably expect to be used prosecutorially). *Id.* at 51. The Court went on to note, however, that

> "[r]egardless of the precise articulation, some examples qualify under any definition – for example, ex parte testimony at a preliminary hearing. . . . Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. *Id.* at 52.

Additionally, in footnote 3, this Court stated, "We find it implausible that a provision which concededly condemned *trial by* sworn ex parte affidavit thought *trial by* unsworn ex parte affidavit perfectly okay." *Id.* at 52, n.3. (Emphasis added).

This Court went on to recognize that they would leave for another day any effort to spell out a comprehensive definition of testimonial. *Id.* at 68. The only litmus test this Court gave in defining "testimonial" evidence was prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations. *Id.* This Court also clearly indicated that business records and statements in furtherance of a conspiracy were non-testimonial in nature. *Id.* at 56. This Court did not declare that all statements made in anticipation of, or for the purpose of, litigation are per se testimonial. It invited the considered judgment by the lower courts of the issue of the testimonial aspect of statements made in anticipation of litigation by the lower courts.

In his concurring opinion, Chief Justice Rehnquist recognized that the majority decision in *Crawford* left attorneys and judges needing a more clear definition of what is testimonial and that it may take months or years to now define this term. *Id.* at 75-76. Chief Justice Rehnquist, however, applauded the majorities decision to

not include business records and official records as "testimonial." *Id.* at 76. "To hold otherwise would require numerous additional witnesses without any apparent gain in the truth seeking process." *Id.*

This case demonstrates why not all declarations made with an awareness that they may be used in subsequent litigation should be considered testimonial per se. There is nothing in the declaration that can be described as believed to be incriminatory when made. Indeed, the declaration is devoid of any statement that is, in fact, incriminatory. The document is routinely prepared and records objective facts and not subjective observations. The health care professional can in no way be considered an accuser, a defamer or a person bearing prejudicial evidence against a suspected drunk driver. The health care professional's declaration certainly does not rise to the level of the ex parte examination and letter of Lord Cobham that so unjustly prejudiced Sir Walter Raleigh. These are trained professionals recording objective facts of a routine blood draw for which they will have little or no independent recollection. The health care professional certainly does not stand in the same shoes as Lord Cobham in the Sir Walter Raleigh trial.

In overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court stated the "unpardonable vice" of the *Roberts* case was its capacity to admit testimonial statements that the Confrontation clause meant to exclude. *Crawford*, 541 U.S. 36, 63. These testimonial statements included allowing a statement of a witness who had confessed to a related crime to be admitted, the admission of plea elocution showing the existence of a conspiracy, prior grand jury testimony and prior trial testimony. *Id.* at 64. The declaration of the health care professional is a different species. It

does not come close to the incriminatory nature of such out-of-court statements. The suspected drunk driver will always have the opportunity to cross examine the police officer that made the traffic stop, made the subsequent DUI arrest and witnessed the blood draw. The police officer will obviously be available for cross-examination regarding their observation of the suspected drunk driver, the odor of alcohol, driving conduct and the results of field sobriety tests. The chemist or expert that examined the blood sample for the presence of alcohol or controlled substances will be cross-examined. The chemist or expert will be available for cross examination regarding the sample tested and the methodology utilized for the test. Within the four corners of the declaration, the health care professional is merely an objective person who obtained a blood sample for later analysis, whether such results favor the suspect or the prosecution.

The health care professionals involved in these cases are trained professionals whose employment depends on ensuring accuracy in the performance of their duties. Chief Justice Rehnquist recognized in *Crawford*, as the Nevada Supreme Court did in *DeRosa v. First Judicial District Court*, 115 Nev. 225, 985 P.2d 157 (Nev. 1999), that the usefulness of cross-examination as a truth finding tool is very limited with respect to certain witnesses. "[I]n a given instance [cross examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross examination would be a work supererogation." *Crawford*, 541 U.S. 36, 74-75.

Since this Court's decision in *Crawford*, state and federal trial courts have, by necessity, undertaken the task

of defining which evidence is testimonial or non-testimonial in nature. In *State v. Dedman*, 136 N.M. 561, 102 P.3d 628 (2004), the Supreme Court of New Mexico found that a blood alcohol report was non-testimonial. It did so by analyzing the report as addressing a routine process and further characterized the report as "non-adversarial" and "made to ensure an accurate measurement." *Dedman*, 136 NM 561, 569, 102 P.3d 628, 636. It also recognized that the blood alcohol report was very different from other examples of testimonial hearsay evidence such as prior testimony at a preliminary hearing before a grand jury or police interrogations. *Id.*

Numerous other state courts have reached different conclusions as to whether certain records and reports made with the knowledge of possible use in litigation are testimonial hearsay and thus subject to the Confrontation Clause and *Crawford* analysis. A select few are: *People v. Johnson*, 121 Cal.App. 4th 1409, 18 Cal. Rptr. 3d 230 (2004) (holding that lab reports in a probation revocation hearing are routine and non-testimonial documents); *People v. Kanhai*, 8 Misc.3d 447, 797 N.Y.S.2d 870 (2005) (holding that certified intoxilizer test results are business records and do not violate right to confrontation); *People v. Durio*, 7 Misc.3d 729, 794 N.Y.S.2d 863 (N.Y. 2005) (holding that autopsy reports are business records); *Smith v. State*, 898 So.2d 907 (Ala.Crim. App. 2004) (holding that admission of autopsy reports, without testimony of medical examiner who performed autopsy, violated defendant's Sixth Amendment right to confrontation).

This Court's decision in *Crawford* did not create a litmus test for characterizing evidence as "testimonial" merely because the document may later be used in litigation. If this were the case, in today's well recognized

litigious society, virtually all records would be testimonial in nature because of the potential for the document to be later utilized *in some manner* at trial.[1] Documents believed to be used in subsequent litigation should only be considered "testimonial" if they were perceived or should have been perceived as accusatory.

The health care professional withdrawing a sample of blood is a qualified professional that is merely memorializing their qualifications and the manner in which the blood was drawn. At the time that the declaration is completed by the health care professional, the declarant is not assured that the document will be used in a criminal prosecution. The contents of the declaration are objective, non-incriminatory, non-accusatory and record routine medical procedures. As such, this declaration is non-testimonial in nature.

B. NRS 50.315(4) Adequately Preserves a Defendant's Constitutional Right to Confront Witnesses by Providing a Statutory Confrontation Mechanism.

In *Walsh II*, the Nevada Supreme Court held that NRS 50.315(6) adequately preserves a defendant's right to cross-examine the health care professional:

> Nothing in *Crawford* compels us to overrule the waiver language in *DeRosa*. The essence of *Crawford* is the need for cross-examination. If

[1] This would include medical records that could potentially be used in a medical malpractice suit, accounting or audit reports that could be later used in criminal or administrative proceedings relating to non-payment of taxes. Indeed, virtually any document generated by a public or private entity may potentially be used in litigation and would thus fall into the category of being "testimonial."

> defense counsel has no bona fide dispute regarding the facts in an affidavit and credibility of an NRS 50.315 declarant, then cross-examination is meaningless. It serves no purpose to have a witness appear if no questions will be asked on cross-examination. Therefore, we are convinced that NRS 50 315 adequately preserves the constitutional right to confront witnesses against a defendant by providing a statutory confrontation mechanism. Any finding or waiver and admission of the affidavit would be subject to a harmless error review on appeal. *Walsh II*, 124 P.3d 203, 208 (2005).

In *DeRosa v. First Judicial District Court*, supra, the Nevada Supreme Court recognized that the presence of the health care professional may do little to further the truth finding process because these witnesses may have little or no recollection of a routine procedure that had been conducted months before.[2] In his concurring opinion in *Crawford*, Chief Justice Rehnquist acknowledged the necessity for materiality in the testimony in relation to effective and substantive cross-examination. He characterized cross-examination as "a tool used to flesh out the truth, not an empty procedure." *Crawford*, 541 U.S. 36, 74. Chief Justice Rehnquist also recognized that cross-examination is a "functional" right designed to promote reliability in the truth finding functions of a criminal trial and that "[I]n a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance

[2] "Finally, the usefulness of live testimony would be questionable in that the affiants and declarant may lack specific independent recollection of the individual circumstances surrounding each routine act." 115 Nev. 225, 233, 985 P.2d 157, 162.

that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." *Id.* at 75, citing *5 Wigmore* § 1420 at 251.

NRS 50.315(6) merely requires that a defendant make a good faith offer of proof that a fact of consequence to the litigation is more likely to be proven or disproven by the presence of the health care professional. This is merely a showing of materiality of the cross-examination; a defendant must point out that there is a good faith question of fact relating to the contents of the declaration of the health care professional that can be answered by the actual presence of the witness. As pointed out by the Nevada Supreme Court, Gehner did not contest the validity of any fact contained in the declaration. NRS 50.315(6) only requires that a defendant have a good faith and bona fide issue with the objective and non-incriminatory facts contained in the declaration of the health care professional such that it is in the best interest of justice to require their presence.

CONCLUSION

Gehner is seeking interlocutory review relating to the admissibility of the declaration of the health care professional before the case has come to trial or has otherwise been concluded. The declaration of the health care professional does not contain any accusatory or incriminatory information and is merely an objective statement of facts relating to the manner in which a blood sample was obtained. As such, this declaration is non-testimonial. In addition, NRS 50.315(6) adequately protects a defendant's

confrontation right by allowing the trial court to require an offer of proof from a defendant to show there is a good faith and material basis to contest the facts contained in the declaration and thereby ensuring effective cross-examination on a material issue. Notwithstanding the City's position that the non-accusatory declaration of the health care provider is not testimonial in nature, the City respectfully requests that this Court deny the Petition for Writ of Certiorari because 1) Gehner's request for interlocutory relief is not appropriate for review by this Court, and 2) the Nevada Supreme Court correctly concluded that NRS 50.315 preserves the Sixth Amendment right to confront witnesses against a defendant by providing a statutory confrontation mechanism.

Respectfully submitted,

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APPENDIX 1

DECLARATION FOR THE
WITHDRAWAL OF WHOLE BLOOD SAMPLE

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

EVENT #: 010522-0202

Dorothy Keefe, says:

THAT I AM A ☑ Registered Nurse ☐ Nurse Practitioner
☐ Licensed Practical Nurse ☐ Medical Doctor
☐ Laboratory Technician/Assistant ☐ Other (specify) _____
☐ Emergency Medical Technician
☐ Physician Assistant

employed by RHS EMSA CORRECTIONAL CARE
That a regular part of my duties is the withdrawing of blood samples from persons and I am authorized to do so by NEVADA STATE BOARD OF NURSING (THE APPROPRIATE LICENSING OR CERTIFYING AGENCY):

That on May 22, 2001, at 0337 AM/PM, I withdrew a sample of blood in a medically accepted manner from a person known to me as: Gehner Michael

and

That I withdrew the sample using no alcohol solutions or alcohol-based swabs; and;

That I kept the sample of blood in my sole custody or control and it remained in substantially the same condition as when I first obtained it until on May 22, 2001, at 0337 AM/PM I delivered the sample to Officer Pacifico P #: 6511 of the LAS VEGAS METROPOLITAN POLICE DEPARTMENT

(agency). I Dorothy Keefe (PRINT DECLARANT'S NAME) DO HEREBY DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Dorothy Keefe
Declarant's Signature

RN — 5/22/01
Title — *Date*

/s/ V. Pacifico 6511
Witness' Signature

05-22-01

APPENDIX 2

NAC 50.055
Nev. Admin. Code ch. 50, s. 055

NEVADA ADMINISTRATIVE CODE
CHAPTER 50. WITNESSES

Current through
December 31, 2005, Supplement 2005-6

NAC 50.055 Form of **declaration** regarding **withdrawal** of **sample** of **blood**. (NRS 50.315)

A **declaration** referred to in subsection 4 of NRS 50.315 must be in substantially the following form:

I, _____, hereby **declare:**

That I am a _____ (occupation) employed by _____ (employer);

That a regular part of my duties is the **withdrawing** of **blood samples** from persons and I am authorized to do so by the _____. (name of appropriate licensing or certifying agency);

That on _____ (date) at ____ o'clock _____m., I **withdrew** a **sample** of **blood** in a medically accepted manner from a person known to me as _____(name); and

That I kept the **sample** of blood in my sole custody or control and it remained in substantially the same condition as when I first obtained it until on _____ (date) I delivered the **sample** to _____ (name of person) of the _____ (name of law enforcement agency).

I **declare** under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____
(Date) (**Declarant's** Signature)

_____
(**Declarant's** Title)

(Added to NAC by Com. on Testing for Intoxication by R112-97, eff. 5-26-98)